RM#11293

USTELECOM
UNITED STATES TELECOM ASSOCIATION

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October 11, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

VIA HAND DELIVERY
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Re: Petition of The United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, Attention: Wireline Competition Bureau

Dear Ms. Dortch:

Please find attached an original Petition of The United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, along with four copies of the Petition.

Please feel free to contact me if you have any questions.

Sincerely,

James W. Olson

James W. Olson
Vice President Law and
General Counsel

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of	)	
	)	
The United States Telecom Association	)	**RM No:**
	)	
For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures	)	
	)	

PETITION FOR RULEMAKING

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PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Federal Communications Commission's (FCC's or Commission's) Rules, the United States Telecom Association (USTelecom)[1] hereby petitions the Commission to institute a rulemaking proceeding to amend existing rules governing pole attachment[2] rates, terms, and conditions as set forth in 47 C.F.R. §§ 1.1401, 1.1402, 1.1404, 1.1409. USTelecom submits that the current rules should be amended because they do not fully implement the Communications Act of 1934, as amended (Communications Act or Act), and unreasonably discriminate against incumbent local exchange carriers (ILECs).

I. INTRODUCTION AND SUMMARY

Section 224(b)(1) of the Act requires the Commission to regulate the pole attachments of all providers of telecommunications service, including ILECs, and to ensure that the rates, terms,

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[1] USTelecom is the nation's leading trade association representing communications service providers, including incumbent local exchange carriers, and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[2] While this Petition only uses the phrase "pole attachment," the use of this phrase is intended to address utility poles, ducts, conduits, and rights of way as defined in 47 C.F.R. § 1.1402(b).

and conditions of pole attachment agreements are "just and reasonable."[3] Despite this clear Congressional directive, the rules promulgated by the Commission do not expressly recognize ILECs' statutory right to be free from unjust and unreasonable pole attachment rates, terms, and conditions. Moreover, the current rules appear to limit the Commission's ability to fashion an appropriate remedy in response to complaints by ILECs about unreasonable rates, terms, and conditions applicable to ILECs attaching to poles of other utilities. These aspects of the current rules are inconsistent with the broad mandate established for the Commission in amended Section 224(b)(1) of the Act. Finally, the current rules are ambiguous as to whether the Commission would use the rate formula set forth in 47 C.F.R. § 1.1409(e)(2) to resolve an ILEC's complaint regarding pole attachment rates.[4]

USTelecom submits that a rulemaking proceeding is necessary to address these issues, and that the rules should be amended to clarify that: (1) an incumbent local exchange carrier, as a "provider of telecommunications service" under 47 U.S.C. § 224(a)(4), is entitled to "just and reasonable" pole attachment rates, terms, and conditions when attaching to poles of other utilities; (2) under Section 1.1404 of the Commission's rules, an ILEC may bring a complaint against a utility for unjust or unreasonable pole attachment rates, terms, and conditions; and (3) the formula set forth in § 1.1409(e)(2) for computing pole attachment rates for "any telecommunications carrier" is also an appropriate default to apply in rate disputes involving all "providers of telecommunications service," including ILECs.

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[3] *See* 47 U.S.C. §§ 224(a)(4), 224(b)(1) (2002).

[4] Although much of the discussion in the instant petition focuses on fashioning a procedural remedy to enable ILECs to seek relief from unreasonable rates charged by utilities, any relief provided by the Commission should make clear that ILECs are also entitled to just and reasonable terms and conditions as prescribed by Section 224.

This petition demonstrates that an affirmative assertion of jurisdiction by the Commission over the pole attachment rates paid by ILECs to other utilities (as well as over pole attachment terms and conditions) is required in order to fully implement Section 224 of the Act and is consistent with prior judicial and Commission decisions as well as the public interest. Although the Act does not prescribe a particular rate formula for ILECs, it is appropriate for the Commission to use the same formula in resolving the rate disputes of competitive local exchange carriers (CLECs) and ILECs. Permitting ILECs to bring complaints under the Commission's rules and obtain an adjudication of pole attachment rates, terms, and conditions established by utilities will help guard against unreasonable discrimination by the utilities as between ILECs and CLECs attaching on the same poles.

The conflict between the requirements of the Act and the current rules not only harms ILECs and their customers but also distorts the competitive marketplace. When ILECs are unreasonably discriminated against through excessive pole attachment rates or unreasonable terms and conditions and are denied the opportunity to resolve disputes over such rates, terms, and conditions, then ILECs are placed at a competitive disadvantage vis a vis CLECs. This competitive disadvantage ultimately harms consumers through increased rates and/or a reduction in competitive service offerings. Beyond the inconsistency between the pole attachment complaint rules and the requirements of the Act, there simply is no justifiable policy reason for allowing utilities to charge ILECs more than they charge CLECs for use of the same space on and access to poles, ducts, conduits, and rights of way. Similarly, there is no justifiable policy reason to provide only CLECs, and not ILECs, with access to the Commission for resolution of pole attachment disputes regarding unreasonable rates, terms, and conditions.

II. THE POLE ATTACHMENT ACT AND THE 1996 AMENDMENTS REQUIRE THE COMMISSION TO ENSURE THAT POLE ATTACHMENT RATES, TERMS, AND CONDITIONS ARE JUST AND REASONABLE FOR ALL ATTACHING PROVIDERS OF TELECOMMUNICATIONS SERVICES.

A. Goals of the Pole Attachment Act and the 1996 Amendments

Congress enacted the Pole Attachment Act in 1978 to address obstacles that cable operators encountered as they sought to expand, particularly, access to what the FCC has described as the "bottleneck facilities" of utility pole owners.[5] The statute focused on eliminating unfair pole attachment practices and established a mandate for the Commission to ensure that attachment rates and conditions imposed upon cable operators were "just and reasonable."[6] Congress believed that the legislation would "serve two specific, interrelated purposes: [t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[7]

The Telecommunications Act of 1996 (1996 Act or Telecommunications Act)[8] revolutionized existing telecommunications regulation by opening access and promoting competition in various telecommunications markets in a wide variety of ways.[9] As part of the

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[5] *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12112, ¶ 13 (2001).

[6] *See Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission's Rules Governing Pole Attachments*, 11 FCC Rcd 9541, 9542, ¶ 3 (1996).

[7] Communications Act Amendments of 1978, S. Rep. No. 95-580, at 122 (1978).

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151, *et seq.*

[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 15505, ¶ 3 (1996).

significant legislative effort to foster competition in local exchange markets, Section 703 of the 1996 Act amended Section 224 of the Communications Act and extended the protections of access rights and rate regulation to "telecommunications carriers" (as defined in Section 224(a)(5)) and other "providers of telecommunications service."[10] The Commission has observed that "the purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments."[11] The Commission found that "Section 703 ... requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."[12]

Both the original statute and the 1996 amendments recognized that utility pole owners can harm competition in two ways: pole owners can either deny access completely or impose unreasonable rates, terms, and conditions on service providers seeking to make attachments. The amended statute, therefore, set forth the requirement in Section 224(f) that utilities provide nondiscriminatory access to "telecommunications carriers" (as defined in Section 224(a)(5)) and the obligation in Section 224(b) to ensure that utilities only charge just and reasonable pole attachment rates to providers of telecommunications service. The access right in Section 224(f) is extended to "telecommunications carriers," which is defined for this purpose to exclude ILECs. However, there is no indication in the statute or legislative history of Congressional intent to similarly limit the right to "just and reasonable" pole attachment rates, terms, and

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[10] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* 13 FCC Rcd 6777, 6780, ¶ 4 (1998).

[11] *Id.* at 6794, ¶ 31.

[12] *Id.* at 6779, ¶ 1.

conditions under Section 224(b). Indeed, the use of "providers of telecommunications service" in lieu of the defined "telecommunications carrier" confirms that Congress intended ILECs to receive just and reasonable rates, terms, and conditions.

B. Section 224(b)(1) Requires the Commission To Regulate Pole Attachments for All Providers of Telecommunications Services, Including ILECs.

Section 224(b)(1) states that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[13] Additionally, Section 224(b)(2) states that the "Commission shall prescribe by rule regulations to carry out the provisions of this section."[14] The clear mandate set by the statute is for the Commission to exercise jurisdiction over all "pole attachments." Section 224(a)(4) defines "pole attachment" as meaning "*any* attachment by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[15] Section 3(46) of the Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public."[16] Incumbent local exchange carriers are properly viewed as "providers of telecommunications service" because they offer telecommunications for a fee directly to the

[13] 47 U.S.C. § 224(b)(1) (2002).

[14] 47 U.S.C. § 224(b)(2) (2002).

[15] 47 U.S.C. § 224(a)(4) (2002)(emphasis added).

[16] 47 U.S.C. § 153(46) (2002).

public.[17] Attachments by ILECs to poles owned by other utilities, therefore, constitute "pole attachments" within the meaning of Sections 224(a)(4) and 224(b)(1).

The Commission's obligation to ensure just and reasonable rates, terms, and conditions applies to *all* pole attachments by providers of telecommunications service and cable operators. In contrast, Section 224(f) only grants nondiscriminatory *access* rights to cable system operators and "telecommunications carriers." Because ILECs are explicitly excluded from the statutory definition of "telecommunications carrier" only in Section 224,[18] the statute does not confer on ILECs *access* rights comparable to those of CLECs and cable television systems under Section 224(f).[19] USTelecom is not asking the Commission to provide ILECs with access rights. Rather, USTelecom is requesting that the Commission ensure that utility pole owners only charge ILECs just and reasonable rates and establish just and reasonable terms and conditions.

Section 224(a)(5) does not limit the Commission's authority to grant the relief USTelecom seeks under Sections 224(b)(1) and 224(a)(4).[20] While Section 224(a)(5) clearly excludes ILECs from the definition of "telecommunications carrier," this exclusion is relevant only to the portions of Section 224 that use the term "telecommunications carrier," such as Section 224(f). Significantly, Section 224(a)(4) does not use that term and instead refers more broadly to attachments by a "provider of telecommunications service." The two provisions are

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[17] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15988-89 (1996).

[18] 47 U.S.C. § 224(a)(5) (2002).

[19] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6781, ¶ 5 (Feb. 6, 1998).

in immediate proximity to one another in the statute, and the difference in vocabulary must be presumed to be intentional.[21]

Legislative history indicates that Congress intended to extend the protection against unreasonable rates, terms, and conditions to *all* telecommunications service providers. For example, the Conference Report states that the amendment was "intended to remedy the inequity of charges for pole attachments among *providers of telecommunications services*" by expanding "the definition of 'pole attachment' to include attachments by *all* providers of telecommunications service."[22] Congress had only to use the phrase "telecommunications carrier" in Section 224(a)(4)'s definition of "pole attachment" if it wished to exclude ILECs from the protection of the Commission's rate regulation. It did not do so. Congress was acutely aware of ILECs when it drafted the 1996 Act and demonstrated its ability to exclude them from certain rights in Section 224(f) of the statute. While Section 224(f) grants access rights only to "telecommunications carrier[s]," nothing in Section 224(b) refers to or limits the Commission's authority to protect against unreasonable rates, terms, and conditions solely to "telecommunications carriers." Where Congress chooses to use different phrases in the same

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[20] However, the current ambiguity of the rules permits parties such as Entergy to make a contrary argument. *See* Letter of Peter G. Kumpe to Lisa Griffin, Deputy Chief of Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission (Dec. 4, 2003).

[21] In a case where there was differing language in two subsections of a statute, one subsection immediately following the other subsection, the Supreme Court has stated that it "refrain[ed] from concluding . . . that the differing language in the two subsections has the same meaning in each. [It] would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, 464 U.S. 16, 23 (1983). Similarly, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

[22] Telecommunications Act of 1996, Conference Report, S. Rep. No. 104-230, at 206 (1996)(emphasis added). *See also* Communications Act of 1995, H.R. Rept. No. 104-204, at 92 (1995).

section of the Telecommunications Act, the Commission must read those phrases as having different meanings.[23]

In fact, the only restriction the statute places on the Commission's jurisdiction over pole attachments is that the Commission's authority is preempted where a state has certified that it is regulating pole attachments.[24] In all other cases involving cable operators and providers of telecommunications service, the Commission is required to ensure that pole attachment rates are "just and reasonable." The current rules, however, are not consistent with this broad mandate. By not expressly providing ILECs with a procedural remedy for unjust and unreasonable pole attachment rates, terms, and conditions and by using internally inconsistent definitions and terms, the rules improperly narrow the jurisdiction of the Commission. The current rules may be interpreted to authorize an ILEC complaint to the Commission concerning unreasonable rates, terms, and conditions. However, the rules can also be viewed – and generally are viewed – as denying ILECs this remedy against unreasonable pole attachment rates, terms, and conditions.[25] To the extent the rules are interpreted not to apply to ILECs, they are inconsistent with the statutory mandate. Certain comments made by the Commission also appear to limit the protections of Section 224 solely to "telecommunications carriers." For example, one Order has

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[23] *See infra* footnote 20. *See also Clay v. United States*, 537 U.S. 522, 528-29 (2003)("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

[24] *See* 47 U.S.C. §§ 224(b)(1); 224(c) (2002).

[25] Under the rules, the term "complaint" means "a filing by a cable television system operator, a cable television system association, *a utility*, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers." *See* 47 C.F.R. § 1.1402(d). Rule 1.1402(e) also defines "complainant" to include a "utility." Rule 1.1402(a) states that the term "utility" includes "any person that is a local exchange carrier." Collectively, these provisions

stated that "[t]he 1996 Act expanded the scope of Section 224 to telecommunications carriers."[26] USTelecom is not aware of any formal complaint filed by an ILEC with the Commission regarding pole attachment rates, terms, or conditions and believes that the lack of such complaints is due to the imprecise language in the current regulations. In contrast to the Commission's rules, the statute clearly states that ILECs, as providers of telecommunications services, are entitled to "just and reasonable" rates, terms, and conditions and that the FCC has an affirmative obligation to adopt procedures to resolve complaints about unreasonable rates, terms, and conditions. Thus, the Commission must amend its rules to conform them to the statute.

III. ASSERTION OF JURISDICTION BY THE FCC TO RESOLVE ILEC POLE ATTACHMENT DISPUTES WOULD SERVE THE PUBLIC INTEREST.

A. Providing a Clear Right of Action for ILECs Under the Commission's Rules Will Ensure Just and Reasonable Pole Attachment Rates, Terms, and Conditions and Prevent Unreasonable Discrimination by Utilities as Between ILECs and CLECs Attaching on the Same Poles.

The vagueness of the current rules, when measured against the clear language of the statute, fails to provide a clear right of action for ILECs to challenge unreasonable pole attachment rates, terms, and conditions, thereby allowing utilities to unreasonably discriminate as between ILECs and CLECs attaching on the same poles. In the absence of clear rules protecting ILECs, utilities are able to demand unreasonable rates from ILECs – rates that bear no relation to

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suggest that the regulations can be read to allow an ILEC, as a utility, to use the FCC's complaint procedures.

[26] *Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission's Rules Governing Pole Attachments*, 11 FCC Rcd 9541, 9543, ¶ 6 (1996). *See also Implementation of Section 703 of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6781, ¶ 5 (1998) (repeating the statutory definition of "utility" and noting that "The 1996 Act, however, specifically excluded incumbent local exchange carriers ('ILECs') from the definition of telecommunications carriers with rights as pole attachers.")

the amount of pole space occupied by an ILEC. However, because Section 224 clearly protects CLECs, utilities are prohibited from demanding the same rates from a CLEC occupying the same amount of space on a pole as an ILEC. This outcome is patently unfair and anti-competitive.

In many markets served by USTelecom's member companies, pole attachment rates, until recently, have remained stable and at levels considered reasonable in light of the cost such companies incur to administer their own poles. Since the passage of the 1996 Act, however, some USTelecom member companies have received demands from certain energy utilities[27] for substantial rate increases far out of proportion to other cost indicia (such as GDP-PI[28] or CPI[29]). In fact, some energy utilities are demanding rate increases of 100% to 500%, which USTelecom believes the Commission would agree are much higher than the maximum rates permitted under the formula the Commission has established for the pole attachments of telecommunications carriers under § 1.1409(e)(2).[30]

As carriers of last resort, USTelecom's member companies typically have no choice but to deal with large energy utilities in order to fulfill their own regulatory obligations.[31] As the

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[27] The term "energy utilities" is meant to encompass those utilities covered by Section 224 (*i.e.*, those that provide electric, gas, water, steam, or other public utilities). 47 U.S.C. § 224(a)(1). Railroads, cooperatives, and state- or federal-owned utilities, however, are expressly excluded from the statute's definition of a "utility" and, therefore, are not subject to the Commission's jurisdiction over pole attachments. As a result of this statutory exclusion, some electric municipal cooperatives and other state- and federal-owned utilities consistently demand excessive rates from ILECs for attaching or impose unreasonable terms and conditions, with no consequences. Thus, even if the Commission were to grant the relief requested herein, ILECs would remain at the mercy of these statutorily exempt utilities.

[28] Gross Domestic Product-Price Index

[29] Consumer Price Index

[30] *See* 47 C.F.R. §1.1409(e)(2).

[31] See *Amendment of Commission's Rules and Policies Governing Pole Attachments, Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12112, ¶ 13 (2001) ("As the Court stated in *Gulf*

Commission has acknowledged, large energy utilities control "the majority of poles nationwide" that are needed to deliver services to residential consumers.[32] While ILECs often own and use their own poles, the balance of pole ownership between energy utilities and ILECs is usually one-sided, and it is becoming increasingly more common for ILECs to attach to poles owned by other utilities. Sometimes it is not only more environmentally friendly, safer, and more efficient to avoid duplicate poles in the public rights of way, but also makes better business economic sense to use existing utility poles where ILECs have none. Moreover, local governments often refuse to permit a second utility (including an ILEC) to build duplicate pole plant for safety, aesthetic, or other public interest reasons. Taking advantage of the public interest in minimizing duplication of poles in the public rights of way, energy utilities are able to leverage their position to effect arbitrage and impose unreasonable rates on ILECs.

If the Commission fails to assert jurisdiction over the rates, terms, and conditions of ILEC pole attachments, the disparate treatment some USTelecom member companies are experiencing is likely to become even greater. USTelecom is aware of several ILECs that have ongoing disputes with large energy utilities over their attempt to unilaterally raise rates unreasonably. Although the energy utilities claim that higher rates are necessary to provide adequate "cost recovery," in reality, the revenue generated from attachers allows the energy utility to bear only a small portion of the relevant cost compared to the large portion of the pole used by these utilities. Moreover, the portion of the pole cost allocated to the ILECs by rates

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Power II, contrary to American Electric's assertions, the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act. Nothing in the record demonstrates that the utilities' monopoly over poles has since changed.").

[32] *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12118, ¶ 23 (2001)("The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.").

imposed by energy utilities is far greater compared to the portion borne by CLECs and cable television companies.

Current rules suggest that ILECs may have a difficult, if not practically impossible, time invoking FCC complaint procedures to obtain relief in these situations, while CLECs enjoy the protections of Sections 224(a)(4) and 224 (b)(1) of the Communications Act. Without a clear right of action for ILECs in the Commission's rules, energy utilities are able to impose unreasonable rates, terms, and conditions for pole attachments – all of which may be unreasonably discriminatory as well. The only practical alternatives for an ILEC faced with unreasonable rates, terms, and conditions are to reduce service, raise rates charged to customers, or, where possible, deploy duplicative utility pole infrastructure.[33] Such options ultimately impose unnecessary costs on telecommunications service customers and enable dominant utilities to engage in unreasonably discriminatory behavior.

B. The FCC Has a Compelling Interest in Ensuring That Pole Attachment Rates, Terms, and Conditions Imposed Upon ILECs Are Just and Reasonable.

The FCC is the most appropriate institution to resolve pole attachment disputes involving ILECs for a number of reasons. First, the Commission has developed considerable expertise in determining what constitutes "just and reasonable" pole attachment rates, terms, and conditions for providers of telecommunications and cable service over the years. Most significantly, the Commission has adopted detailed formulas for calculating maximum attachment rates for cable operators and telecommunications carriers in cases where complaints are brought to the

[33] As noted above, local land use restrictions frequently limit a carrier's ability to deploy separate facilities. *See supra* page 12.

Commission.[34] By contrast, most state courts and regulatory bodies are not familiar with pole attachment rates, terms, and conditions, and their determinations of what is "reasonable" are likely to be divergent.[35]

Second, the Commission has a compelling regulatory interest in ensuring that all providers of telecommunications service, including both incumbents and new entrants, are not burdened with unreasonably discriminatory rates, terms or conditions when attaching to poles controlled by other utilities. The Commission has observed that the purpose of Section 224 is to "ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."[36] Parties negotiating pole attachment rates, terms, and conditions are usually not in an equal bargaining position,[37] and regulation by the FCC prevents pole owners from establishing unreasonable rates, terms, and conditions and distorting competition. While it is clear that CLECs, wireless providers, and cable operators may submit complaints about unreasonable pole attachment rates,

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[34] *See* 47 C.F.R. § 1.1409(e)(1) (formula for attachments by cable operators); 47 C.F.R. § 1.1409(e)(2) (formula for attachments by telecommunications carriers).

[35] Although Section 224(c) expressly provides for state regulation of pole attachment rates, terms, and conditions, the most recent public notice issued by the Commission states that only 18 states and the District of Columbia have certified that they have exercised such authority. *See* 47 U.S.C. § 224(c). *See also* Public Notice, States That Have Certified That They Regulate Pole Attachments, DA 92-201 (rel. Feb. 21, 1992). However, these certifications are over 13 years old and it is not clear that they have ever been updated to account for changes in the law, specifically the 1996 Act, governing pole attachments. In the absence of state regulation over rates, terms, and conditions for pole attachments, the Commission has full authority over pole attachment rates, terms, and conditions.

[36] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* 13 FCC Rcd 6777, 6780, ¶ 2 (1998).

[37] *Id.*, ¶ 11.

terms, and conditions to the FCC, the current rules are generally understood to exclude ILECs from complaint procedures. An unintentional consequence of the current rules is that energy utilities may unreasonably discriminate against ILECs, while CLECs are clearly protected from unreasonable pole attachment rates, terms, and conditions. As noted previously, there simply is no justifiable policy reason for allowing utilities to charge ILECs more than they charge CLECs for use of the same space on and access to poles. Nor does the Act support such unreasonable discrimination. USTelecom submits that the rules governing the right to "just and reasonable" pole attachment rates, terms, and conditions should be competitively neutral, giving ILECs and CLECs – and their customers – equal protection from unreasonable rates, terms, and conditions imposed by utility pole owners.

C. Commission and Judicial Precedent Confirm That the Commission's Exercise of Authority Over Pole Attachment Rates Is Appropriate.

In *National Cable & Telecommunications Assoc. v. Gulf Power Co.*, 534 U.S. 327 (2002), the Supreme Court addressed the question of whether the authority granted to the Commission in Section 224(b) was limited only to attachments by cable television providers and non-ILEC telecommunications carriers. More specifically, the Court in *Gulf Power* was asked to consider whether, under Section 224(b)(1), the Commission could regulate pole attachments for cable lines providing both cable television and high-speed Internet service and attachments by wireless providers. The Court held that the Commission had jurisdiction over such attachments and rejected the argument that Sections 224(d) and (e) narrowed the Commission's authority. Although neither the delivery of broadband services by a cable operator nor attachments by wireless telecommunications providers are specifically included in the statute's language, the Court found that Section 224(b)(1) gives the Commission a "general mandate to set just and

reasonable rates."[38] Although the *Gulf Power* case did not involve an ILEC, this Supreme Court decision squarely supports a broad interpretation of the Commission's pole attachment authority under 224 (b)(1) as advocated in this petition.

While the Commission has not yet specifically addressed the issue of whether ILECs may invoke the complaint procedures and rate formulas established pursuant to Section 224, prior FCC decisions are not incompatible with an interpretation giving ILECs such an option. The Commission has stated quite clearly that it is "committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand."[39] Explicit inclusion of ILECs in the Commission's scheme of pole attachment rate regulation is fully consistent with this mission.

To date, the FCC has not hesitated to exercise its authority over pole attachment rates. For example, the Commission has asserted jurisdiction over attachments providing intermingled cable and non-video broadband services under Section 224.[40] The Commission has also asserted authority over attachments by wireless telecommunications providers, rejecting arguments by utility pole owners that failure to include the word "wireless" in the language of Section 224

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[38] *NTCA v. Gulf Power*, 534 U.S. at 334.

[39] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* 13 FCC Rcd 6777, 6787, ¶ 16 (1998).

[40] *See Florida Cable Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 18 FCC Rcd 9599, ¶ 6 (2003); *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Elec. Co.*, 6 FCC Rcd 7099 (1991); *aff'd Texas Utilities Elec. Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

prevented wireless providers from benefiting from the protections of Section 224.[41] The Commission has also asserted jurisdiction over ILECs when assigning the costs and burdens associated with unusable space on utility poles under Section 224(e). In doing so, the Commission concluded that its interpretation of 224(e)(2) was consistent with its "recognition that pole attachments are defined in terms of attachments by a 'provider of telecommunications service'" and that there was "no indication from the statutory language or legislative history that any particular attaching entity should not be counted."[42] Surely, if ILECs are to be counted as entities responsible for paying the costs of pole use they, too, must have the right to a "just and reasonable" pole attachment rate under Section 224(b)(1). The statute clearly permits ILECs to invoke 224(b)(1). Therefore, the Commission should amend its rules to make them consistent with the statute.

IV. IN RESOLVING ILEC RATE DISPUTES, THE COMMISSION SHOULD EMPLOY THE SAME FORMULA CURRENTLY USED IN CLEC RATE DISPUTES.

While the statute is very clear about the fact that the Commission is obligated to ensure that the rates, terms, and conditions imposed upon ILECs' pole attachments are "just and reasonable," the statute leaves open whether a single rate formula should be applied to the attachments of ILECs and CLECs. The statute expressly requires the Commission to adopt specific regulations to govern rates for the pole attachments of telecommunications carriers and cable television system operators.[43] To fulfill this statutory directive, the Commission

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[41] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6797-98, ¶ 37-40 (1998)

[42] *Id.* 6802, ¶ 50.

[43] 47 U.S.C. §§ 224(d)(1), (e)(1) (2002).

subsequently adopted a formula to establish the "maximum just and reasonable rate" for telecommunications carriers, and this formula is set forth clearly in 47 C.F.R. § 1.1409(e)(2).[44] When a CLEC is unable to resolve a rate dispute privately and brings a complaint before the Commission, this is the formula that is consistently applied because a CLEC is a "telecommunications carrier." However, to date, the Commission has not applied this formula to the pole attachment rates charged to an ILEC.

The Commission should apply the formula set forth in § 1.1409(e)(2) when it is trying to determine what constitutes a "just and reasonable" attachment rate for a particular ILEC. The factors included within the formula would be identical for all types of telecommunications providers. There is no compelling reason why the standard used to establish a "just and reasonable" rate for ILECs should be different from that of a CLEC. Furthermore, adoption of a single formula promotes the interests of fairness, consistency, and competition.

V. PROPOSED AMENDMENTS TO THE RULES

Several amendments to the rules are necessary to make them fully conform to the statute. As discussed earlier, the statute uses different terminology in setting out the rights of access and in granting the Commission authority over the rates, terms, and conditions for pole attachments. By contrast, the Commission's rules do not make the same distinction. For example, the term "telecommunications carrier,"[45] rather than "provider of telecommunications service," is used throughout the Commission's pole attachment rules (such as Sections 1.1401 and 1.1404(d)), without making any distinction between those rules governing access, pursuant to Section 224(f),

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[44] *See* 47 C.F.R. § 1.1409(e)(1) (rate formula for cable operators providing cable services); § 1.1409(e)(2) (rate formula for telecommunications carriers).

and those rules governing rates, pursuant to Section 224(b). The conflation of the two types of rules first becomes evident in the statement of purpose found in Section 1.1401, which indicates that the rules governing complaint and enforcement procedures were adopted "to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable."[46]

As indicated in Section II.B. above, the statute does not confer upon ILECs access rights to poles; therefore, it is appropriate that the rules relating to access rights and related complaint procedures refer to "telecommunication carriers." However, to ensure consistency with Section 224(b), Commission rules governing rate regulation and related complaint procedures should refer to "providers of telecommunications service" in order to encompass ILECs. Section 1.1403 establishes that only a cable television system operator or telecommunications carrier has a right of nondiscriminatory access to poles, conduits and rights-of-way controlled by utilities. This provision is fully consistent with the statute. However, the rules contain only a single set of complaint procedures, found at Section 1.1404, and those procedures fail to acknowledge the difference between complaints regarding access to pole attachments and complaints regarding unreasonable rates, terms, and conditions. Instead, Section 1.1404(d)(1) states only that "[t]he complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or *telecommunications carrier* and the utility."[47] In cases where no

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[45] 47 C.F.R. § 1.1402(h) defines a "telecommunications carrier" as "any provider of telecommunications services, except that the term does not include aggregators of telecommunications services ... or incumbent local exchange carriers."

[46] 47 C.F.R. § 1.1401.

[47] 47 C.F.R. § 1.1404(d)(1) (emphasis added).

present pole attachment agreement exists, Section 1.1404(d)(2) requires that the complaint be accompanied by a "statement that the cable television system operator or *telecommunications carrier* currently has attachments on the poles, ducts, conduits or rights-of-way."[48] The language of these provisions suggests that ILECs are entirely excluded from the protections of Section 224 and FCC complaint procedures because they are not "telecommunications carriers" for purposes of Section 224.

USTelecom submits that a rulemaking proceeding is necessary to amend the current language and structure of the rules so they more faithfully implement the statute. Most importantly, the Commission should amend Section 1.1404 and set out distinct complaint procedures for access rights and regulation of rates, terms, and conditions. Provisions related to complaints about denials of access should refer to "telecommunications carriers," while provisions related to unreasonable rates, terms, and conditions of pole attachments should refer to "providers of telecommunications service." Additionally, the rules should recognize that ILECs are "providers of telecommunications service" within the meaning of the statute and as such are entitled to "just and reasonable" pole attachment rates, terms, and conditions and may use FCC complaint procedures when good faith negotiations fail to resolve a dispute. A corresponding change to Section 1.1401 is called for as well.

A secondary issue that the Commission should consider in conjunction with such rulemaking proceedings is whether the default rate formula set forth in Section 1.1409(e)(2) for disputes involving "any telecommunications carrier" should also be used as the default formula in disputes involving ILECs as attachers. Amending the rules to explicitly apply the formula to disputes involving ILECs would not only be consistent with Section 224 but also would

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[48] 47 C.F.R. § 1.1404(d)(2).

constitute sound public policy. The default "just and reasonable" rate for an ILEC attaching to an electric utility pole should be the same as the rate available to a CLEC attaching to the same pole. Broader application of the formula in Section 1.1409(e)(2) is more equitable and provides greater certainty to private parties negotiating pole attachment agreements with utilities.

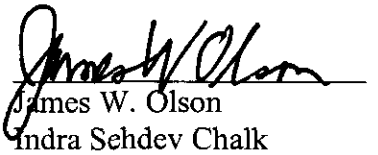
VI. CONCLUSION

Amendment of the rules to clearly establish the Commission's authority over the rates, terms, and conditions of ILEC pole attachments is required by Section 224(b)(1), consistent with the public interest and appropriate under existing judicial and Commission precedent. The current rules need to be amended because they do not clearly differentiate between the complaint procedures available to "telecommunications carriers" seeking pole access and the complaint procedures available to "provider[s] of telecommunications service" that need to challenge unreasonable rates, terms, and conditions for pole attachments. In fact, the current language of the rules appears to exclude ILECs from all rights and complaint procedures established pursuant to Section 224. As discussed earlier, certain aspects of the current rules are not consistent with the statutory mandate and harm ILECs, their customers, and competition in local telecommunications markets. For these reasons, USTelecom respectfully requests that the Commission initiate a rulemaking proceeding to consider amending the existing rules governing

pole attachment regulation set forth in 47 C.F.R. §§ 1.1401, 1.1402, 1.1404, and 1.1409 in the manner described herein.

Respectfully submitted,

The United States Telecom Association



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